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January 11, 1996

HAND DELIVERY

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION

Re: Response to Letter of December 13, 1995
Notice of Apparent *Ex Parte* Violation

Dear Mr. Caton:

In response to your letter dated December 13, 1995 ("Caton Letter"), this letter is to provide you with further clarification on an apparent *ex parte* violation that I brought to the attention of the Managing Director on October 4, 1995.

Omnipoint's concern is that petitioners Whitestone Wireless, L.P., Southern Personal Communications Systems, and Minco P.C.S. (the "Petitioners") made a written *ex parte* presentation in violation of the Commission's prohibition on *ex parte* presentations in a restricted proceeding when they filed their September 22, 1995 petition to deny (the "Petition") Omnipoint's broadband PCS Block A MTA license and license application. The following is a detailed explanation of the "restricted" nature of the proceeding involved, and the reasons why we believe that the Petitioners pleading violates the *ex parte* rules.

On August 25, 1994, the Commission placed Omnipoint's license application on public notice, assigning it FCC File No. 15002-CW-L-94. The licensing application proceeding became "restricted" for *ex parte* purposes on September 26, 1994 with the filing of timely petitions to deny by Bell Atlantic Personal Communications, Inc., Advanced Cordless Technologies, Inc., and Cablevision Systems Corporation. See, 47 C.F.R. § 1.1208(c)(1)(i)(B) & (c)(1)(ii) (adjudicatory proceeding becomes "restricted" for

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ex parte purposes upon filing of formal opposition). The license application was granted on December 13, 1995, in "In the Matter of American Personal Communications, *et al.*," Memorandum Opinion and Order, 10 FCC Rcd. 1101 (1994). Several parties, including those that filed petitions to deny the license application, appealed the December 13th licensing order to the D.C. Circuit. *See, Advanced Cordless Technologies, Inc. v. FCC*, No. 95-1003 (and consolidated cases)) (D.C. Cir.). The consolidated case remains pending before the Court to this day and so it is our understanding that the license proceeding remains "restricted." 47 C.F.R. § 1.1208(a) (prohibition on *ex parte* presentations in restricted proceedings "continues in effect until the proceeding has been decided . . . and such decision is no longer subject . . . to review by any court.>").

It is our view that the Petitioners' "Petition to Deny" is an *ex parte* presentation made in a restricted proceeding that is not exempt from the *ex parte* rules. It is a written communication "directed to the merits or outcome" of the license application proceeding, 47 C.F.R. § 1.1202(a), because it interjects allegedly new issues into the licensing proceeding, it advocates that the "pioneer preference license should be denied," and it incorporates and endorses arguments made by the other parties that filed petitions to deny, especially arguments made by Bell Atlantic. *See*, Petition at 27 and n.9. While Section 1.1202(b)(1) of the Commission's rules may exempt from the definition of "*ex parte* presentation" those written presentations which are "served on the parties to the proceeding," the Petitioners' certificate of service does not indicate that the Petition was served on all parties to the proceeding, such as Bell Atlantic, Advanced Cordless Technologies, or Cablevision Systems.¹ Therefore, Section 1.1202(b)(1) does not exempt Petitioners from the *ex parte* restrictions.

Finally, I note that it is not Omnipoint's position that Section 1.1204(b)(1) of the Commission's rules exempted it from the obligation to provide proper service of its

¹ In addition, we note that Petitioners filed their "Petition to Deny" in PP Docket 93-253 and GEN Docket 90-314, and in the proceeding "In the Matter of Deferral of Licensing of MTA Commercial Broadband PCS". *See*, Petition at 1. The Petitioners' certificate of service certainly does not evidence service on the parties involved in those two dockets or the captioned proceeding.

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October 4, 1995 Opposition.² *Cf.*, Caton Letter at n.1. Rather, Section 1.1204(b)(1) provides that a party may make a written presentation that is exempt from treatment as an *ex parte* presentation, so long as that presentation is authorized by other Commission rules or by statutory provision. Omnipoint's Opposition was filed pursuant to its regulatory and a statutory rights to formally oppose a petition to deny its license or license application. *See*, 47 C.F.R. §§ 24.430(a)(2) (oppositions to PCS applications and responsive pleadings must be filed in accordance with Section 1.45(a) of the Commission's rules) & 1.45(a) (opposition to any petition may be filed within 10 days); 47 U.S.C. § 309(d)(1) ("[t]he applicant shall be given an opportunity to file a reply" to a petition to deny); 5 U.S.C. § 554(c) (in an adjudicatory proceeding, agencies shall give all interested parties opportunity to reply). Because Petitioners filed an untimely petition to deny, and failed to follow Commission procedure, they are not similarly exempt.

I hope that this letter clarifies Omnipoint's position on this issue. Please contact me directly if you have any further questions.

Sincerely,



Mark J. O'Connor
Counsel for Omnipoint Corporation

/mjo

cc: Thomas A. Hart, Esq.

² As reflected in the certificate of service attached to Omnipoint's October 4 Opposition and its Letter to Andrew Fishel, Omnipoint did, in fact, serve counsel for Petitioners.